TERRORISM PREVENTION CONFERENCE/Strike Habeas Corpus Reforms

SUBJECT: **Conference report to accompany the Antiterrorism and Effective Death Penalty Act of 1996 . . . S. 735. Hatch/Dole motion to table the Moynihan motion to recommit with instructions.**

ACTION: MOTION TO TABLE MOTION TO RECOMMIT AGREED TO, 64-35

SYNOPSIS: The conference report to accompany S. 735, the Terrorism Prevention Act, will enact law enforcement provisions to prevent terrorism and to apprehend and punish terrorists, and will reform Federal and State capital and noncapital habeas corpus procedures.

The Moynihan motion to recommit with instructions would direct conferees to insist on striking the habeas corpus provision on Federal court deference to State court decisions (the habeas corpus provisions in the conference report were taken from the Senate-passed bill without alteration; "habeas corpus," in the context of this debate, refers to the collateral (not on the merits) review of criminal convictions). More specifically, the deference provision will bar a criminal who was convicted in State court from filing a habeas corpus petition in Federal court alleging that constitutional, legal, or treaty requirements were violated in the process of convicting him, unless the adjudication of the claim in State court: resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented.

Debate was limited by unanimous consent. Following debate, Senator Hatch, for himself and Senator Dole, moved to table the Moynihan motion. Generally, those favoring the motion to table opposed the motion to recommit; those opposing the motion to table favored the motion to recommit.

Those favoring the motion to table the motion to recommit contended:

The Moynihan motion would strike directly at the heart of the habeas reforms in S. 735 by removing the deference standard for State court decisions. This standard must not be removed, especially if our Nation is going to have an enforceable death penalty.

(See other side)

YEAS (64)

Republicans (51 or 98%)		Democrats (13 or 28%)
Abraham	Helms	Baucus
Ashcroft	Hutchison	Bryan
Bennett	Inhofe	Feinstein
Bond	Jeffords	Ford
Brown	Kassebaum	Graham
Burns	Kempthorne	Hollings
Campbell	Kyl	Johnston
Chafee	Lott	Lieberman
Coats	Lugar	Nunn
Cochran	McCain	Reid
Coverdell	McConnell	Robb
Craig	Murkowski	Rockefeller
D'Amato	Nickles	Wyden
DeWine	Pressler	
Dole	Roth	
Domenici	Santorum	
Faircloth	Shelby	
Frist	Simpson	
Gorton	Smith	
Gramm	Snowe	
Grams	Specter	
Grassley	Stevens	
Gregg	Thomas	
Hatch	Thompson	
Hatfield	Thurmond	
	Warner	

NAYS (35)

Republicans (1 or 2%)	Democrats (34 or 72%)	
Cohen	Akaka	Inouye
	Biden	Kennedy
	Bingaman	Kerrey
	Boxer	Kerry
	Bradley	Kohl
	Breaux	Lautenberg
	Bumpers	Leahy
	Byrd	Levin
	Conrad	Mikulski
	Daschle	Moseley-Braun
	Dodd	Moynihan
	Dorgan	Murray
	Exon	Pell
	Feingold	Pryor
	Glenn	Sarbanes
	Harkin	Simon
	Heflin	Wellstone

NOT VOTING (1)

Republicans (1)	Democrats (0)
Mack-[2]	

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Federal habeas review takes place only after there has been a trial, direct review by a State appellate court, direct review by a State supreme court, and then a petition for direct review to the United States Supreme Court. Further, in a capital case, the petitioner often files a clemency petition, so the State executive branch also has an opportunity to review the case. Reviews of the same case do not end with this series, however. In virtually every State, postconviction collateral proceedings exist. In other words, prisoners may file State habeas petitions alleging that their convictions need to be thrown out because of process mistakes. For instance, they may allege their lawyers were incompetent, or that their confessions were invalid because they were unfairly questioned when they were tired. Each of those habeas petitions may be appealed to a State appellate court, then to a State Supreme Court, then to the United States Supreme Court, and they may again by brought to the State executive branch on an appeal for clemency. After all these reviews are held, a prisoner may file a Federal habeas petition.

Our contention is that there is no reason to give a convicted criminal yet one more hearing in a Federal appellate court unless he or she can demonstrate that the State conviction was unreasonable in its application of the Constitution or Federal law. In choosing a reasonableness standard, this bill is following several Supreme Court precedents. For instance, In *Harlow* v. *Fitzgerald*, the Supreme Court held that if a police officer's conduct were reasonable than damages could not be sought as a result of that conduct. Similarly, in *Leon* v. *United States*, it held that if a police officer's conduct in conducting a search were reasonable, then no fourth amendment violation obtained and the court could not order suppression of evidence. The Supreme Court has repeatedly endorsed the principal that no remedy is available if the Government acted reasonably. The Supreme Court's consistent rulings, and common sense, tell us that State court decisions should not be subject to reversal if the State courts reasonably applied Federal law to the facts.

State courts are required to uphold the Constitution and to apply Federal laws faithfully. We believe that State juries are as good as Federal juries, that State court judges are as qualified as Federal judges, and that State prosecutors are as adept as their Federal counterparts. Most Federal judges and other Federal court officials are drawn from State court systems. Getting their paycheck from Uncle Sam does not somehow make them more clever or knowledgeable; they are the same people, with the same talents, working for a different employer.

If our colleagues truly believe that State courts are somehow incompetent to conduct proceedings in accordance with the Constitution and Federal law, then they should do away with State courts altogether. Their support for this motion certainly indicates that they do not trust in the competence of State courts, because it will allow the current situation to stand, which is that State decisions on the Constitution and Federal law can be entirely ignored when a Federal court decides if it will grant a habeas petition. A prisoner who has already had his habeas claims thoroughly reviewed and rejected at the State level does not appeal those State rulings in Federal district court; he starts all over with a new appeal, which may be identical to the appeal that was already rejected by the State.

This situation is utterly ridiculous. A convicted criminal who has exhausted all of his appeals in a State court system should not be allowed to start all over again in the Federal court system. In fact, the Supreme Court has ruled that no collateral or even direct appeals need to be made for a conviction to be valid. The right to habeas review that is being amended by this bill is not the writ of habeas corpus that is in the Constitution. That writ applies to two circumstances: the right to challenge an illegal imprisonment before trial, and the right to determine whether a trial court has jurisdiction to hear a case. The right to habeas review that is being amended by this bill is a right that was granted by statute, and which was intended to allow review in cases in which the Constitution and Federal law clearly had not been followed by a State.

Reform of that law is needed mostly because of the manner in which it has been abused in capital cases. Federal collateral review of State cases that were properly decided is routinely sought one or more times in capital cases for two basic reasons. First, it is done as a delaying tactic. By pursuing lengthy reviews in Federal courts, lawyers are able to delay the just execution of criminals who have been sentenced to death. Second, and relatedly, it is done because there are certain liberal Federal judges who have proven very willing to misinterpret and twist precedents and laws in order to rule favorably on those habeas petitions. Those judges decisions are routinely overturned by higher courts, or result in further State proceedings that again arrive at the same result. In the end, the one result is delay.

Some Senators, we are certain, support the Moynihan motion because they oppose the death penalty and thus approve of the unnecessary, lengthy delays that are caused by the abuse of the Federal habeas review process. We respect their philosophical opposition to the death penalty, but we do not think it is appropriate to hide behind habeas corpus. If they oppose the death penalty, they should fight to outlaw it, and should fight to change the minds of the huge majority of Americans who support it. They should not argue for sabotaging the judicial branch of government with unworkable, nonsensical requirements in order to make the death penalty unenforceable.

The language in this conference report, in sum, will not affect the writ of habeas corpus in the Constitution. It will affect only a statutory right that has been greatly abused by opponents of the death penalty. The Moynihan motion would allow that abuse to continue. The motion, therefore, should be defeated.

Those opposing the motion to table the motion to recommit contended:

If we had to live either in a country without free elections or a country without habeas corpus, we would choose the former.

Habeas corpus is one of the fundamental civil liberties on which every democratic society of the world has built subsequent political liberties. A building cannot stand without its foundation; we understand our colleagues are frustrated that the criminal justice system works slowly, but that frustration should not lead them into attacking the foundation of our democracy.

The provision that would be stricken by the Moynihan motion will require Federal courts to accept State decisions, unconstitutional or not, as long as they are reasonable. This requirement is unconstitutional for three reasons. First and foremost, it directly violates the habeas corpus clause of the Constitution. The Constitution provides that "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in the cases of rebellion or invasion the public safety may require it." Any doubt as to whether this guarantee applies to people held in State as well as Federal custody was removed by the passage of the Fourteenth amendment. Nevertheless, this conference report will bar a Federal court from granting habeas corpus relief unless a State court has unreasonably applied the Constitution or Federal law to the facts of a case. Under this astounding, unconstitutional formulation, the mere fact that the Constitution was applied wrongly by a State must be disregarded by the Federal Government unless the State's mistake rose to the level of "unreasonableness."

Requiring Federal courts to defer to State court rulings will also violate the Constitution by restricting the powers granted to the judiciary under Article III of the Constitution. The oldest constitutional mission of the Federal courts, as set forth in *Marbury* v. *Madision*, is "the duty . . . to say what the law is." We cannot pass a law telling Federal courts they must give their constitutional authority to State courts, nor, as a practical matter, should we. Letting State courts decisions stand without review will result in States determining constitutional standards across the country in different manners, thereby destroying uniformity in constitutional interpretations. What the Constitution means will vary State-by-State. Instead of having one Constitution, we will have 50 Constitutions.

The final manner in which we believe the deference section of the habeas reforms in this conference report violates the Constitution is by denying due process. A measure is subject to proscription under the due process clause of the Constitution if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" as viewed by "historical practice" (*Medina* v. *California*). Independent Federal court review of the constitutionality of State criminal judgments has existed since the founding of the Nation, first by writ of error, and since 1867 by writ of habeas corpus. Nothing is more deeply rooted in America's legal traditions and conscience. As Justice O'Conner stated in *Wright* v. *West*, "We have always held that Federal courts, even on habeas, have an independent obligation to say what the law is."

Our colleagues want to pass this deference standard mainly because they believe that it will speed the execution of condemned criminals. We doubt it. Most Federal habeas petitions are disposed of in less than 1 year. In contrast, it takes an average of 5 years for States to dispose of habeas petitions. Federal collateral review of State decisions is thus already relatively speedy. If executions are to become swifter, the reforms are going to have to come at the State, not the Federal, level.

The Moynihan motion offers Senators a last chance to avoid making a serious mistake. The deference standard will seriously damage the writ of habeas corpus, and will do little to speed executions. We urge our colleagues to vote in favor of the Moynihan motion, which would insist on the removal of this unconstitutional standard.